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Donna Wieting
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National Marine Fisheries Service
1315 East-West Highway
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The Ocean Conservancy

[RE: Authorization for Commercial Fisheries under the Marine Mammal Protection Act of 1972; Zero Mortality Rate Goal 68 FR 40888]

Dear Ms. Wieting:

The Ocean Conservancy appreciates the opportunity to comment on NOAA Fisheries' Advanced Notice of Proposed Rulemaking (ANPR) to set the levels of incidental mortality and serious injury that would satisfy the goal of insignificant levels approaching a zero rate for all commercial fisheries. The Ocean Conservancy has been a key player in the development and implementation of the provisions within the Marine Mammal Protection Act (MMPA) that govern the incidental take of marine mammals in commercial fishing. As a participant on all existing take reduction teams, we hope that NOAA Fisheries uses these comments to prepare a quality proposed rule that satisfies the requirements of the MMPA and advances the goal of reaching a zero mortality rate in commercial fisheries. Our more detailed comments on the three options proposed by NOAA Fisheries are found below, but in sum, The Ocean Conservancy supports Option 1— a 10% of PBR as the most effective means to meet the zero mortality rate goal (ZMRG) of the MMPA.

Background

The Marine Mammal Protection Act (MMPA) requires that: "...it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations re reduced to insignificant levels approaching a zero mortality and serious injury rate;"--a provision that is typically referred to as the zero mortality rate goal (ZMRG). 16 U.S.C. § 1371 (a)(2). In 1994, Congress further maintained and refined the ZMRG, providing target dates, within the provisions to govern takes of marine mammals in the course of commercial fisheries stating: "In any event it shall be the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to

insignificant levels approaching a zero mortality and serious injury rate within 7 years after the date of enactment of this section [April 30, 2001]." 16 U.S.C. § 1387 (a)(1). Congress also mandated that: "Commercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after the date of enactment" of this section [April 30, 2001]. 16 U.S.C. § 1387 (b)(1).

The MMPA also mandates that the long-term goal of a take reduction plan shall be: "to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans."[1] 16 U.S.C. § 1387 (f)(2).

Congress developed the legislative guidance for protecting marine mammals and defining the ZMRG in response to unsustainable mortality levels. However, while their objective was clear in both the language of the law and their explanation which states: "..the objective of regulation would be to approach as closely as is feasible the goal of zero mortality and injury to marine mammals...It may never be possible to achieve this goal, human fallibility being what it is, but the objective remains clear." (H. R. Conf. Rep. No. 92-1488 at 23); initial Congressional efforts to define ZMRG and NOAA fisheries regulations centered around "...using the best available technology to assure minimal hazards to marine mammal populations" (H.R. Rep No. 92-707, at 24 (1971)). This approach continued through 1981 when Congress clarified that ZMRG "is satisfied in the case of the purse seine fishery for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable." (H. R. Rep. No. 97-228 at 17) The "best techniques" approach was reaffirmed in 1984 when Congress reauthorized the MMPA (H. R. Rep. No. 98-758 at 8 (1984)).

However, Congress did not modify ZMRG for other commercial fisheries, recognizing that other fisheries (citing the foreign high seas salmon gillnet fishery as an example) had not developed new techniques and equipment for reducing incidental mortality. Therefore, the goal in MMPA section 101(a)(2) would remain unchanged for other commercial fisheries "to stimulate new technology for reducing the incidental taking of marine mammals." (H. R Rep. No. 97-228 at 17-18 (1981)).

By 1988 and 1992, the continued high levels of mortality in the ETP tuna fishery and other fisheries made it clear that the application of the best available techniques, alone would not satisfy the objective to eliminate incidental mortality of marine mammals in

[1] Section 117(a)(6) of the MMPA requires the generation of a potential biological removal level (PBR) for all marine mammal stocks. Section 3(20) of the MMPA defines PBR as the "maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock, while allowing that stock to reach or maintain its [OSP]."

commercial fishing operations. Other action forcing mechanisms were necessary in order to achieve the ZMRG. Congress reversed its course for reducing dolphin mortality in the ETP by passing the International Dolphin Conservation Act of 1992, which prohibited U.S. vessels from setting nets on or to encircle dolphins to catch tuna and limited dolphin mortality from U.S. vessels to specific numbers for specific periods. Congress continued to follow this course by amending the MMPA in 1994 to included a specific date (7 years following enactment or April 30, 2001) by which commercial fisheries had to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate.

In 1997, Congress amended the MMPA in the International Dolphin Conservation Program Act of 1997 to establish stock- specific annual mortality limits (starting in 2001) of less than or equal to 0.1 percent of the minimum population estimate of the stock (section 302(3)). This stock-specific mortality limit is the mathematical equivalent of 10 percent of PBR for a cetacean stock of unknown or depleted status when using the default values for net productivity and the recovery factor. With these changes, Congress was moving away from a regulatory framework for reducing mortality that relied solely on technological modifications to one that established quantifiable mortality limits that were approaching biologically "insignificant levels" and which forced commercial fisheries to further reduce their mortality in order to move toward the ultimate goal of eliminating marine mammal mortality.

NOAA Fisheries has not formally defined what levels of incidental mortality and serious injury would satisfy the goal of insignificant levels approaching a zero rate or ZMRG. On June 16, 1995 (60 FR 31666) NOAA Fisheries proposed regulations to implement section 118 of the MMPA. In that proposed rule, NOAA Fisheries stated that a fishery could be classified a Category III fishery and have satisfied the requirements of ZMRG in one of two ways, if a commercial fishery causing incidental mortality and serious injury of marine mammals is one that collectively with other fisheries is responsible for the annual removal of: "ten percent or less of any marine mammal stock's potential biological removal level, or more than 10 percent of any marine mammal stock's potential biological removal level, yet that fishery by itself is responsible for one percent or less that stock's potential biological removal level." 60 Fed. Reg. 31666 at 31671. See also 50 C.F.R. § 229.2. The definition of the ZMRG in the proposed rule was related to proposed regulations for classifying fisheries so that only those fisheries that had achieved insignificant levels of incidental mortality and serious injury would be in Category III." 68 Fed. Reg. 40888 at 40890.

The Ocean Conservancy (then the Center for Marine Conservation) strongly supported these quantitative benchmarks especially those defining ZMRG as 10% of PBR. We noted our opposition to a second option that NOAA Fisheries proposed where: "Zero Mortality Rate Goal means the reduction of the annual number of incidental mortalities and serious injuries in each fishery to insignificant levels approaching a zero mortality and serious injury rate; at a minimum, this requires that the rate of incidental mortality and serious injury is at the lowest level that is technologically and economically practicable." 60 Fed. Reg. 31666 at 31671. The Ocean Conservancy opposed this

provision because the definition would merely "perpetuate the flaws in the ZMRG because it is qualitative, not quantitative, and offers no targets or benchmarks for the fishery. Without a quantified stock-based level of mortality and serious injury, operators have little or no incentive to improve fishing technology and practices to reduce incidental mortality." See comments by the Center for Marine Conservation, July 26, 1995.

Therefore, it is for this reason that The Ocean Conservancy supports Option 1—10% of PBR as the most effective means to meet the ZMRG of the MMPA. In the next section we will analyze the various options proposed by NOAA Fisheries

EVALUATION OF THE OPTIONS FOR INSIGNIFICANCE THRESHOLD

NOAA Fisheries sees the ZMRG as being a two-part exercise. "First, what is the level of mortality and serious injury for each stock of marine mammals that could be considered an insignificance threshold (T_{ins}), below which incidental mortality and serious injury can be considered insignificant?" 68 Fed. Reg. at 40890-91. In the second part of the ZMRG analysis NOAA Fisheries proposes "...if a fishery or group of fisheries has a level of mortality greater than this T_{ins} and available technologies would not allow further reductions within the feasible economics of that fishery, could NMFS determine that these fisheries had met the ZMRG?" Id. Under the first part of NOAA Fisheries' analysis, it outlines three possible options on which we comment on in turn.

OPTION 1

The Ocean Conservancy strongly supports Option 1—10 percent of PBR.
First, we concur with NOAA Fisheries three rationales that support the adoption of this option:

- "Familiar to NMFS' constituents because this definition was proposed in the 1995 proposed rule implementing section 118 of the MMPA (60 FR 31666, June 16,1995).
- Easy to calculate and explain because it is based on the well understood PBR equation; [and]
- Consistent with current definition for Category III fishery, such that the List of Fisheries would provide an easy metric for which fisheries have met Tins." 68 Fed. Reg. at 40891.

It would be helpful if NOAA Fisheries could report what percent delay in recovery and at what percent of the carrying capacity the populations would be maintained at under Option 1. Under Options 2 and 3, NOAA fisheries maintains that those options "can be calculated through modeling to take other population parameters into account (e.g., severely declining stock)." Id. It would be helpful if the same modeling could be used for Option 1, and we recommend that NOAA Fisheries do so for the proposed rule alternatives.

From a biological standpoint, the ZMRG is in some aspects similar to the negligible impact standard, each standard striving to have insignificant levels of mortality. "Negligible impact" is defined by regulation as an "impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." (50 CFR § 216.103) A 1995 NMFS workshop to develop guidelines for marine mammal stock assessments stated: "Biological significance is measured in terms of the impact such mortality has on the affected stock of marine mammals. An insignificant level of mortality is a level that has a negligible impact on the affected stock." Workshop participants agreed that "mortality and serious injury incidental to fishing operations would be insignificant to a stock of marine mammals if such mortality and injury were only a small portion (e.g., 10% of the PBR [Potential Biological Removal Level]) of the affected stock." (NOAA 1995, at 12) Workshop participants further agreed that at that level the fisheries related mortality and serious injury would be negligible. (NOAA 1995, at 12.) If at that point, scientists recognized that mortality levels of 10% of PBR are negligible, it is biologically defensible that those mortality levels could also be used to set the insignificance threshold or ZMRG, in much the same way as the agency has used this criterion in stock assessment reports and take reduction teams to evaluate progress toward the ZMRG.

In the ANPR NOAA Fisheries states: "Subsequent, more complete, simulation modeling revealed that annual mortality of 10 percent of a stock's PBR or less would, indeed, not delay the stock's recovery by more than 10 percent; however, for some stocks, particularly those endangered species with a recovery factor of 0.1, a higher level of mortality would not delay recovery by more than 10 percent. Thus, it appeared that the use of 10 percent of PBR in a final rule could result in over-regulation of some fisheries." 68 FR 40890. We disagree with the previous statement and the assertion by NOAA Fisheries that Option 1 "may lead to overly conservative levels of protection for certain endangered species, whose PBR levels are already set at biologically insignificant levels." 68 FR 40892. The recovery factor of 0.1 is only used for endangered species, species for which every precaution should be taken to eliminate incidental mortality and serious injury in commercial fishing operations and promote the recovery of these species. Until 1994, the MMPA prohibited the taking of depleted marine mammal stocks in the course of commercial fishing.[2] In light of that prohibition, setting the ZMRG at levels that ensure the recovery of endangered species while still allowing commercial fishing operations to continue seem highly defensible and not overly restrictive.

Under Option 3, NOAA Fisheries claims it "would allow for flexibility in the relationship between T_{ins} and negligible impact under 101(a)(5)(E), such that negligible could be greater or less than T_{ins} depending on population parameters circumstances." Since the insignificance threshold for Option 1 is less than Option 3 this statement should also apply to Option 1.

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[2] In Kokechik Fishermen's Assoc. v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988), the court found that NMFS could not issue take permits without first determining whether or not the population of each species was at the optimum sustainable population level. Id. at 802-03.

OPTION 2

The Ocean Conservancy opposes Option 2—10 Percent Delay in Recovery. A 1990 Marine Mammal Commission recommendation and a 1992 legislative proposal by the NMFS both proposed that a delay of 10% in the time needed to attain OSP could be considered negligible. The concept was embodied in the calculation of PBR where a 10% delay in attaining OSP is incorporated into the use of a 0.1 recovery factor in calculating PBR for endangered species. Thus there would be only a 10% delay in attaining OSP if mortality of an endangered species equaled the entire PBR. As noted in the ANPR this option is also equivalent to where the "mortality and serious injury is less than 0.2 percent of the minimum population estimate of a stock for cetaceans and 0.6 percent for pinnipeds." 68 Fed. Reg. at 40891. While this option would likely maintain populations at or above 90 percent of the carrying capacity, it would not adequately protect threatened and endangered stocks.

Generally, non-endangered species are managed less conservatively than endangered species. For most other marine mammal stocks, recovery factors are higher than 0.1, usually 0.5 or higher. Currently, insignificant mortality is considered a fraction of the PBR for any stock. Under Option 2, a 10% delay in recovery to OSP would allow the take of the entire PBR of an endangered species to be considered ZMRG, but only a portion of the PBR for non-endangered species. This option, therefore, is less protective of endangered species, the vary species that require more protection. This option also flies in the face of the mandate of the MMPA, which establishes two separate goals that must be met:

> *"The immediate goal of the take reduction plan for a strategic stock shall be to reduce, within six months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal level established for that stock under section 117. The long-term goal of the plan shall be to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate..." 16 U.S.C.1387(f)(2) (emphasis added)*

This option would violate this mandate for endangered species where the PBR would equal ZMRG.

Under this option NOAA Fisheries asserts that the insignificance threshold "can be calculated through modeling to take other population parameters into account (e.g., severely declining stock)." 68 Fed. Reg. at 40891. Other than this vague reference, there are no indications or examples as to how the models would be adjusted to achieve greater protection for severely declining stocks or threatened and endangered species.

Finally, in the ANPR, NOAA Fisheries states that this option: "Does not allow for flexibility in the relationship between T_{ins} and section 101(a)(5)(E) of the MMPA, such

that other population parameters could not be taken into account in making a negligible impact determination, potentially making it illegal for certain fisheries to operate." Id. First, it is unclear why only this option contains this statement. Second, it is unclear what other population parameters must be considered that would allow takes that exceed the T_{ins} and thus do not meet the negligible impact determination to, once considered, comply with that standard. Third, the level of incidental mortality or serious injury of threatened and endangered species taken in the course of commercial fishing operations, must either meet or be mitigated such that they meet the negligible impact standard.

OPTION 3

The Ocean Conservancy opposes Option 3, which calls for a 0.1 percent Nmin (cetaceans); 0.3 percent Nmin (pinnipeds). While this option would maintain populations at or above 95 percent of carrying capacity and ensure that mortality and serious injury would not cause more than a five percent delay in recovery, it is not as protective of endangered species as Option 1.

We do not dispute NOAA Fisheries claims that Option 3:

- is "Easy to calculate because it is equivalent to the PBR equation using a recovery factor of 0.05 for all stocks;"
- has "Consistent application across all stocks because the recovery factor is set as the same number for all stocks;" and
- Would allow for flexibility in relationship between T_{ins} and negligible impact under 101(a)(5)(E), such that negligible impact could be greater or less than T_{ins} depending on population parameters circumstances." 68 Fed. Reg. at 40891.

Again, under this option NOAA Fisheries asserts that the insignificance threshold "can be calculated through modeling to take other population parameters into account (e.g., severely declining stock)." Id. As we stated above, this vague reference, provides no indications or examples as to how the models would be adjusted to achieve greater protection for severely declining stocks or threatened and endangered species. Without more detail, we are concerned that this may move the insignificance threshold away from a quantitative number to a more qualitative judgment.

NOAA Fisheries claims that one of the pros of Option 3 is that it is "Consistent with ETP dolphin standard for T_{ins} which is an 'insignificant' metric specifically defined by Congress." While that may be true, Congress also stated: "Nations harvesting yellowfin tuna in the eastern tropical Pacific Ocean have demonstrated their willingness to reduce dolphin mortality progressively to a level approaching zero through the setting of annual limits, with the goal of eliminating dolphin mortality in that fishery." See Pub. L. 105-42 sec. 6 (b)(1). This level is but one limit, and given the goal of eliminating mortality, Congress never intended this limit to be the endpoint. In fact Congress when establishing these limits called for a review on the progress toward meeting the stated limits and objectives and provided for: "...recommendations to further the objectives set ..." implying that additional limits could be set if nations were not making progress toward eliminating dolphin mortality in the fishery. See Pub. L. 105-42 sec. 6 (c).

Finally, we disagree with NOAA Fisheries' assertion that Option 3 "May be too restrictive for stocks at their optimum sustainable population level by setting the T_{ins} for such stocks at five percent of their PBR level." 68 Fed. Reg. at 40891. We believe that stocks must be maintained at their optimum sustainable population level and to do that, the actual mortality and serious injury should be a small as possible. The insignificance threshold should never be the basis to undermine the ZMRG by allowing large numbers of marine mammals to be killed or seriously injured merely because their populations have reached their optimum sustainable population level or carrying capacity.

AVAILABLE TECHNOLOGY AND ECONOMIC FEASIBILITY

In the second part of the ZMRG analysis NOAA Fisheries proposes "...if a fishery or group of fisheries has a level of mortality greater than this T_{ins} and available technologies would not allow further reductions within the feasible economics of that fishery, could NMFS determine that these fisheries had met the ZMRG?" Id. In this question NOAA Fisheries is looking for ways to consider options for applying the available technology and economic feasibility considerations required by section 118(f)(2) of the MMPA.

The addition of the "immediate goal" language was meant to drive the Secretary of Commerce to use every effort to develop technology that would move fisheries toward zero mortality, while recognizing that it was not the goal the Act to prevent all purse seining on porpoises, or to eliminate commercial fishing. See 118 Cong.Reg. at 25,271. Here, the question of economic feasibility was first raised in this debate of the bill since it was agreed that porpoise mortality should be reduced as much as technologically possible. Id. Representative Goodling stated that "We all desire that marine mammal mortalities be reduced significantly – and as fast as possible – but there must be an appropriate balancing of equities between the two extremes of a zero mortality rate and elimination of a commercial fishing industry." 118 Cong.Rec. 34,643 (1972).

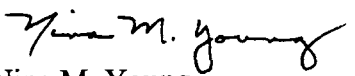
In Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297 (D.D.C. 1976), the federal court weighed in on whether the legislative history implied some kind of economic feasibility or "balancing of the equities" test. While the tuna industry argued that balancing of the equities was called for, the court found that such a test was not the intent of Congress. The court found that the interests of marine mammals come first under the MMPA, and only when their protection was provided for, could accommodation of commercial interests occur. Id. at 309. The statements of Representative Goodling, regarding a "balancing of the equities" implied only that after a determination was made that a species' population would not be disadvantaged by some permitted takings, that the zero mortality policy goal would not, by itself, prevent all takings outright. Id. at 308. Moreover, the court rejected a "means-oriented" approach based on economic feasibility, instead focusing on a "results-oriented" approach where takings are not allowed where the estimated impact is to the disadvantage of the species. Id. 308-09. Therefore, the court found that the use of the best technology alone cannot justify results inconsistent with the purposes of the MMPA. Id.

Given these court findings it is clear that NOAA Fisheries' obligation is to first ensure that takes of all marine mammal species meet the insignificance threshold. The insignificant threshold becomes the driving mechanism to reduce mortality and serious injury and the incentive for fishermen and scientists to devise economically feasible technologies to meet this objective. We believe NOAA Fisheries second option to incorporate available technology and economic feasibility into an initial assessment of whether or not fisheries had achieved the ZMRG by the statutory due date is flawed and contrary to Congressional intent and the court's findings. Under NOAA Fisheries second option there is no incentive for future development of technologies to continue to reduce incidental mortality and serious injury to insignificant levels approaching zero, and a fishery with incidental mortality above T_{ins} would merely have to claim that newly developed technologies were not economically feasible. If given a clear goal, experience has demonstrated that take reduction teams can work cooperatively to devise the necessary technologies and secure the funds to implement those technologies, despite objections by the fishing industry that those technologies were nonexistent or economically infeasible.

CONCLUSION

The Ocean Conservancy supports Option 1 for the insignificance standard and believes that this standard should be the goal to drive the development of economically feasible technologies. We look forward to working with NOAA Fisheries at the draft rule stage to finalize the ZMRG definition in a final rule.

Sincerely



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